

# **Plaintiffs' Exhibit 19**

JAMS

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IN RE: FACEBOOK INC., )  
CONSUMER PRIVACY USER )  
PROFILE LITIGATION )  
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HELD VIA ZOOM

REPORTER'S TRANSCRIPT OF PROCEEDINGS:

JAMS Special Master Hearing

Saturday, December 4, 2021

REPORTED BY:

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1 variety of materials from the ADI. Judge Corely  
2 concluded that the basis for withholding the materials  
3 which was the work product doctrine was not appropriate;  
4 that the dual purpose rule meant that the materials were  
5 not protected by work product.

6 Plaintiffs had also made clear that we were  
7 not seeking attorney-client privileged communications.  
8 We weren't seeking communications to or from the  
9 attorneys. And instead, we were seeking the underlying  
10 factual information and materials relating to the ADI.

11 We won that motion to compel. The order was  
12 issued on September 8th.

13 Facebook has had since then to abide by the  
14 order. The order required production of specific  
15 materials relating to the six exemplar apps and then had  
16 this key language to the parties to work with you as  
17 Special Master to produce other materials consistent  
18 with the guidance.

19 Facebook had essentially ignored that  
20 instruction. Many efforts to meet and confer on this,  
21 many efforts to get Facebook to state a position, all  
22 unsuccessful.

23 So here's where we are today. These are the  
24 specific items we've asked Facebook to produce that are  
25 consistent with Judge Corely's order.

1           Their demand for ADI correspondence was  
2           already litigated, and Judge Corely rejected it after an  
3           extensive sampling and logging exercise and in-camera  
4           review.

5           Judge Corely stated multiple times, and  
6           plaintiffs even agree, that the only relevant and  
7           discoverable materials are underlying facts about the  
8           investigation.

9           She also issued an order that, as we all know,  
10          identifies three buckets of documents relating to  
11          underlying factual materials that she found  
12          discoverable. Those are the documents at issue here  
13          today.

14          She didn't order production of a single ADI  
15          document or communication or other materials from our  
16          sample privilege logs.

17          So the three buckets are clearly identified in  
18          Judge Corely's order.

19          One, background and technical reports prepared  
20          by non-attorneys, audits conducted by non-attorneys,  
21          and then interviews conducted by non-attorneys. And we  
22          already produced these materials to the extent they  
23          exist for the six exemplars, as Judge Corely ordered.

24          And the only open issue is whether materials  
25          in these three buckets are discoverable for other apps

1 beyond the six. And if they are, how and when they  
2 should be produced.

3 All the other requests, as I'll walk through  
4 now, have already been rejected but Judge Corely.

5 So if you look at the record, which is -- I  
6 think has to be our north star, we can walk through  
7 briefly the procedural history here. And slide 1, I  
8 said they demanded all documents relating to ADI.

9 Judge Corely ordered a sample logging for six  
10 apps. She conducted in-camera review with extensive  
11 briefing. She expressed skepticism about the relevance  
12 of ADI e-mails, saying only that facts are discoverable.  
13 And then she -- she resolved the ADI motion, ruling that  
14 e-mails are not required to be produced.

15 And let's continue.

16 SPECIAL MASTER GARRIE: Sorry. Before you  
17 go -- what order was -- so there's a couple ADI orders.  
18 There's --

19 MR. SNYDER: Yeah.

20 SPECIAL MASTER GARRIE: -- one on the motion  
21 to compel.

22 So when you say order, which one are you  
23 referring to? Because I did read the -- your filings  
24 and submissions.

25 MR. SNYDER: Sure. The -- the -- the order

1 that -- I'm not sure what the date of the order was. I  
2 know when the hearing was.

3 Martie, do you know the date of the order?

4 MS. KUTSCHER CLARK: Yes. It's the most  
5 recent September order which says that it disposes of  
6 all of the prior ADI motions, including the motions for  
7 communications.

8 MR. SNYDER: Right.

9 So what happened is after we spent months  
10 collecting and logging the ADI communications,  
11 Judge Corely reviewed a sample of those, of plaintiffs  
12 choosing, by the way, and then she told plaintiffs,  
13 quote, "A lot of it I don't think is relevant at all."  
14 And then she said, "Some materials are privileged and I  
15 actually think you don't even need."

16 And this was an important moment in the -- in  
17 this process because after litigating the scope of the  
18 plaintiffs' ADI request for more than a year,  
19 Judge Corely realized that these weren't the types of  
20 materials that contain discoverable facts; that is,  
21 facts concerning app developers. And she asked a bunch  
22 of questions. She said, "What precisely is it that the  
23 plaintiffs need from the investigation?"

24 And they finally acknowledged, Your Honor --  
25 Your Honor -- Mr. Garrie, that what they wanted was the

1 MR. SNYDER: Yes.

2 SPECIAL MASTER GARRIE: Is that what -- when  
3 you're making the statement, is that what you're relying  
4 on?

5 MR. SNYDER: Yeah. Well, it's that we had  
6 only given her six sample apps chosen I think by the  
7 plaintiffs, and as to those documents that we gave, she  
8 said we've -- we have no reason why those particular  
9 documents are privileged. So she made that ruling,  
10 which is her right. But she didn't say categorically  
11 that all of our documents within these three buckets  
12 are not privileged because she didn't consider them.

13 In other words, she said the facts are not  
14 privileged but attorney-client work product still  
15 attaches.

16 And you'll see when we talk about the process  
17 going forward, we believe, you know, and I think  
18 Judge Corely's order makes clear, that to the extent  
19 Facebook still has an assertion of privilege over new  
20 documents, those are valid, actionable, and enforceable  
21 under this order.

22 So the three -- there's no disagreement that  
23 background technical reports prepared by nonlawyers,  
24 audits conducted by nonlawyers, and interviews conducted  
25 by nonlawyers, are within -- are within the ambit of

1 what is producible.

2 And Judge Corely directed us to work with  
3 you, Mr. Garrie, obviously regarding any additional  
4 productions but consistent with her order. So --

5 SPECIAL MASTER GARRIE: This is my question:  
6 So I read her order and I -- when you look at page 2 of  
7 the order, I don't know -- sorry for interrupting you --  
8 but if you look at page 2 of the order, on lines 9 to  
9 12, this is where I -- where --

10 Counsel Kutscher, if you could -- Clark, if  
11 you could bring it up by chance, or I can --

12 MS. KUTSCHER CLARK: Yes. If you give me one  
13 second.

14 SPECIAL MASTER GARRIE: And we'll go back to  
15 the presentation.

16 MR. SNYDER: Yeah. And while she's getting  
17 it -- there we go. Good.

18 SPECIAL MASTER GARRIE: If you look at line 9  
19 where it starts with "While Facebook has agreed to  
20 produce some information," and then she cites the  
21 docket, right, and you go look at the docket, "it  
22 refuses on privilege grounds to produce the reports,  
23 audits, and interviews and non-attorney communications  
24 related to the same."

25 She doesn't say that it's to the six; right?



1 MR. SNYDER: Yep.

2 SPECIAL MASTER GARRIE: -- where -- because if  
3 you read up above -- but if you just look at those  
4 lines -- or if you want to show me where in that order  
5 it is --

6 MR. SNYDER: Sure. Sure.

7 Yeah. I think all that's doing is stating  
8 the party's position, and it does not reflect even  
9 tangentially, much less directly, the Court's guidance.

10 The Court's guidance is in the three  
11 categories of documents that she said are producible.  
12 And she knew that communications were at play. She knew  
13 that plaintiffs wanted all communications. And had  
14 she -- had she intended her order to direct the  
15 production of communications, it would have said so.  
16 And it expressly -- or it does not order the production  
17 of communications and --

18 SPECIAL MASTER GARRIE: I agree there's no --  
19 that's why we're here; right? There's no explicit  
20 compulsion of the letter.

21 MR. SNYDER: Right.

22 But an order should be written -- I mean, I  
23 can send you the case law, and I don't need to.

24 An order should be read, you know, by its  
25 plain terms. And where -- there's much -- a lot of case

1 law that says "where a party explicitly requests"  
2 something. And in the order, that material is not  
3 ordered produced, that means that it is not subject to  
4 production. Meaning the language you showed us proves  
5 our point. It proves that she considered non-attorney  
6 communications, obviously, because the plaintiffs wanted  
7 them, but did not order them produced.

8 So there's no fair reading of the order other  
9 than that it considered and disposed of the request for  
10 nonlawyer communications --

11 SPECIAL MASTER GARRIE: You then don't read  
12 additional materials consistent with this  
13 guidance because --

14 MR. SNYDER: No. The guidance is three  
15 categories.

16 SPECIAL MASTER GARRIE: I got it.

17 On -- "Facebook shall produce the background  
18 and technical reports, audits" --

19 MR. SNYDER: Yes.

20 SPECIAL MASTER GARRIE: -- "developer  
21 interviews of the six chosen by the parties, as Facebook  
22 has offered why those particular documents are  
23 privileged."

24 MR. SNYDER: Right.

25 SPECIAL MASTER GARRIE: So that's -- okay. I

1 understand.

2 MR. SNYDER: Okay. In other words, the case  
3 law is clear, from the Supreme Court cases on down, that  
4 where an order disposes of an issue and where parties  
5 make arguments for the production of materials or  
6 otherwise, and the order does not address that  
7 particular, you know, request in its directive, it's  
8 considered disposed of and --

9 SPECIAL MASTER GARRIE: We'll entertain that  
10 argument from plaintiffs and from you.

11 I just -- I'm sorry for interrupting you. And  
12 I had questions for plaintiffs, and I held my tongue and  
13 I didn't ask. So I'll hold my tongue and let you finish  
14 your summary. And I apologize.

15 MR. SNYDER: No worries.

16 SPECIAL MASTER GARRIE: Because I do have  
17 questions for plaintiffs as well so --

18 MR. SNYDER: Yeah. I'm winding down.

19 So the bottom line is the judge considered all  
20 the arguments, including plaintiffs' argument for all  
21 communications, rejected some of our arguments, rejected  
22 some of their arguments, and then distilled its guidance  
23 into an order to produce reports, audits, and  
24 interviews.

25 And in the comments she made prior to issuing

1 to make some reasonable good faith effort. That's not  
2 your position; right? You're still -- it's not being  
3 narrowed to remove that --

4 MR. SNYDER: No, no, no. No. No. In other  
5 words, we believe that if you order us to produce more  
6 documents in these three categories, then -- then  
7 that's -- then I don't think -- other than the  
8 attorney-client and work product objections that we may  
9 have to portions of those documents or maybe the  
10 entirety of one -- I have no idea -- I don't think we  
11 have any other -- other objections.

12 SPECIAL MASTER GARRIE: Here, let me ask my  
13 question.

14 If there's communications between Facebook  
15 and FTI about -- I mean, I read through your -- it was  
16 a pretty fairly informative briefing, and the  
17 plaintiffs, they included some of these sample reports,  
18 and there's clearly, you know -- well, I don't know  
19 clearly, but it would appear that there was a lot of  
20 work done.

21 MR. SNYDER: Yes.

22 SPECIAL MASTER GARRIE: There was  
23 communication between FTI examiners -- I'm not sure  
24 who --

25 MR. SNYDER: Yep.

1           And if after reviewing all those reports they  
2     want -- they say, "We need more with respect to app 6,  
3     7, and 8 because we think the reports are insufficient,"  
4     you know, I guess they can come back again and ask for  
5     that.

6           But, you know, they're going to have a lot of  
7     facts to work with on 7500 reports, and they're going to  
8     see this is a dry well, honestly.

9           So I think that, you know, in terms of  
10    proportionality and order of proceedings, that if you're  
11    going to order us to produce those three categories, we  
12    should start there.

13          And, you know, I think, again, if they want  
14    information, you know, it's not -- and it's not going to  
15    take a night or even 30 days to do that because even  
16    Judge Chhabria ruled, when we were simply reproducing to  
17    the plaintiffs, reproducing our FTC productions, meaning  
18    we had a file that said "FTC Production," we could have  
19    literally just forwarded it to the plaintiffs.

20          But Judge Chhabria said, "No."

21          And when the plaintiffs said, "Well, they  
22    could just push forward on that file."

23          And Judge Chhabria said, "No." They have  
24    every right to review those FTC productions for  
25    privilege because we produced stuff to the FTC that we

1 wouldn't produce to private plaintiffs because they're  
2 our regular.

3 So too here. We can't just hit forward on  
4 7500 reports because as you see, embedded in the reports  
5 are a lot of information and we're going to have to  
6 review them and redact anything and log that may be  
7 privileged. Maybe Southwell sent an e-mail to  
8 Stroz Friedberg that is embedded in a report.

9 And so, you know, again, jumping the gun, if  
10 you order us to produce reports, we can do it on a  
11 rolling basis, but we're going to need to have attorneys  
12 put eyes on 7500 reports. And consistent with the  
13 guidance the judge gave us, withhold anything that's  
14 either work product or attorney-client privilege.

15 SPECIAL MASTER GARRIE: One of the issues --  
16 we can jump into it now --

17 And so, Counsel, is there anything you want to  
18 say or -- I have a question or two.

19 MR. LOESER: We have six reports here.  
20 There's not a word redacted or removed because  
21 Judge Corely ordered that none of this was privileged  
22 or protected by work product.

23 So it's impossible to believe that Facebook  
24 genuinely believes it now gets to apply the same  
25 rationale for withholding that it was -- was rejected